

* / It should be noted that the Joint Sports Claimants have raised with the NAB, PBS and other parties objections in addition to those set forth herein. In some instances these objections have been resolved amicably. In other cases, objections may yet be resolved depending upon the other parties' making available certain documentation. Should the requisite documentation not be provided or should such documentation lead to additional objections, the Joint Sports Claimants reserve their right to raise appropriate objections at the evidentiary hearings. See 50 Fed. Reg. at 13847, at ¶ (6).

I. Objections To The NAB's Direct Case

A. Selected and Misleading References to
Testimony and Evidence in Prior CRT Pro-
ceedings (Abel pp. 9-11, 30-32, 35-36,
38-39).

The NAB's principal witness is Mr. John Abel, an NAB employee with the title of Senior Vice President for Research and Planning. The NAB appears to have offered Mr. Abel as an "expert" witness. Under the guise of such allegedly "expert" testimony, however, Mr. Abel has in fact presented a series of argumentative and misleading assertions concerning past CRT records -- assertions which bear more resemblance to NAB counsel's proposed findings and appellate briefs than to "expert" testimony.

In particular, on pages 9-11, 30-32, 35-36 and 38-39, Mr. Abel selectively refers to various pieces of testimony and documentary evidence provided primarily by other NAB witnesses in prior CRT distribution proceedings -- witnesses who are not offered to testify in this proceeding. For a number of reasons, the Joint Sports Claimants strenuously object to such rererences in Mr. Abel's testimony.

First, Mr. Abel is not competent to testify as to what other witnesses have testified or as to what prior evidentiary records have established. To the extent that Mr. Abel has any "expertise," it relates solely to his

experience in communications research -- not to recharacterizing and interpreting the testimony and documentary exhibits of others.^{*/} Such evidentiary material is already in the record and the witnesses are no longer subject to cross-examination; opposing counsel can, in opening and closing arguments, proposed findings and briefs, argue as to the meaning and significance of such evidentiary material. This, however, is not the function of supposedly "expert" witnesses.

Second, Mr. Abel's characterizations of prior testimony represent demonstrably unreliable and misleading hearsay testimony.^{**/} Mr. Abel makes no representation, as one would expect of an "expert," that he has read all of the testimony of those witnesses which he cites and that his characterizations constitute a fair and objective summary of their testimony. Instead, it is quite clear that Mr. Abel has selected those

^{*/} Under Rule 702 of the Federal Rules of Evidence, expert testimony is proper only where it consists of certain "scientific, technical or other specialized knowledge" which would "assist the trier of fact to understand the evidence or determine a fact in issue." Mr. Abel's testimony about what others have already testified before the Tribunal does not meet this standard.

^{**/} The Joint Sports Claimants do not suggest that the Tribunal should exclude evidence merely because it is hearsay. Rather, hearsay may be admitted only if it is shown to be sufficiently reliable. See Outside Counsel's Memorandum to the CRT at Sec. III.A.3 (Dec. 31, 1984).

portions which arguably support his theories and has ignored the remainder.^{*/}

For example, in support of NAB's claim for an award based upon "compilation," Mr. Abel refers to the testimony of Mr. Jacobson -- a former WGN executive and witness presented by the Joint Sports Claimants in the 1980 proceeding. According to Mr. Abel (p. 31), Mr. Jacobson allegedly testified that WGN had created an image as a "family station." However, in testimony ignored by Mr. Abel, Mr. Jacobson explained that this "image" had no practical value in the distant cable marketplace -- which, after all, is the only relevant issue before the Tribunal.^{**/}

^{*/} Moreover, in no case does Mr. Abel even bother to cite the specific transcript pages which allegedly support his opinions as to what the other witnesses testified.

^{**/} NAB counsel asked Mr. Jacobson whether the station's "family" image made any difference in distant markets. Mr. Jacobson responded:

"A No, because I think they are taking the distant signal for other reasons. I think they are taking the distant signal for sports like WGN has and the 2,000 films in the library that WGN has, and the situation comedy which is probably the strongest block of situation comedy by any independent station in the country.

"Q Why would a family station be appealing in Chicago, but not in --

"A That was the image we were trying to impart on the city. We were trying to impart that on the city because our image was Chicago's own television station. People taking Chicago's
[Footnote continued on following page.]

Similarly, in language which is almost identical to that found in prior NAB briefs before the Court of Appeals, Mr. Abel (at pp. 9-11) complains that the NAB's past awards were lower than their Nielsen numbers.^{*/} Again, such characterizations of past records are misleading. The NAB's share of viewing according to the MPAA/Nielsen study in 1979 was about 6 percent. What Mr. Abel ignores is that this

[Footnote continued from preceding page.]

WGN signal were taking it for a specific reason, they didn't have to build an image. Distant signals were taken from superstations in order to get more people to subscribe to the system.

"I mean, we all agree that the object of any cable system is to get as many subs as they can. And, therefore, those cable systems will put on what they feel will get them subs. And if you can bring in a station that gives you sports and motion pictures and situation comedies that you can't get anyplace else, it is going to assist you in bringing in subs.

"Q But your station thought the image was important?

"A Only in Chicago, because that is the only place we were programming for. We weren't programming for anyplace else in the United States"
(1980 Tr. 4926-27).

*/ Mr. Abel also complains, as has NAB's counsel, that NAB's award was lower than its BBDO numbers. But so too was the award to sports. Indeed, the sports award in 1979 was some 20 percentage points lower than what would have been produced by the BBDO survey.

study did not take account of (1) any awards to PBS, the Canadians, Music and NPR; and (2) NAB counsel's own recommendation, which was followed by the Tribunal, that sports receive an award greater than its share of audience because of its "special appeal to cable operators." (1980 Tr. 1562). When these factors are accounted for, it is clear -- contrary to Mr. Abel's assertions -- that NAB's award of 4.5 percent in 1979 was almost exactly equal to its share as reflected in the MPAA/Nielsen viewing study.

The above examples certainly do not exhaust the list of instances where Mr. Abel has departed from his role as an expert and distorted the past records. The point here, however, is not simply that Mr. Abel has done so -- but rather that testimony of the nature which Mr. Abel offers is inherently unreliable hearsay and improper because it is susceptible to such distortions.

Third, to be sure, the misleading and unreliable nature of Mr. Abel's "expert" testimony can be brought out on cross-examination of Mr. Abel during the hearings. Ultimately, however, such an approach will do no more than result in prolonged arguments during cross-examination as to what other witnesses had testified before the Tribunal years ago, and what they meant by such testimony. Mr. Abel will thus be given, improperly, the opportunity to recharacterize,

reformulate and perhaps rehabilitate other witnesses' testimony. Clearly, such an exercise will not serve the orderly and efficient functioning of the evidentiary hearings.

Finally, Mr. Abel's discussion of only parts of past testimony is squarely inconsistent with the spirit underlying Tribunal's directive that the "complete testimony of each witness whose testimony is designated (i.e., direct, cross and redirect) must be referenced." 50 Fed. Reg. at 13846. While this directive relates specifically to record designations, its purpose was to prevent exactly that type of partisan and incomplete selectivity which characterizes Mr. Abel's testimony.^{*/}

B. Reference to NCTA Survey (Abel pp. 30-31).

On pages 30-31 of his written testimony, Mr. Abel refers to one of the findings of a survey conducted for the National Cable Television Association ("NCTA") in 1984. The Joint Sports Claimants object to this reference on the grounds that: (1) Mr. Abel is not a competent sponsoring witness to discuss the NCTA study; and (2) the NAB has refused to provide access to the entire study, including the

^{*/} Section 301.52(j) of the Tribunal's rules also provides that the Tribunal will "discourage" "cumulative evidence." There is certainly no better example of "cumulative evidence" than one witness purporting to restate the testimony of another witness.

underlying questionnaires and a complete description of the methodology of the study.

There is nothing in Mr. Abel's testimony to indicate that he played any role or had any involvement whatsoever in the design or execution of the NCTA survey. As such, he has no personal knowledge of any aspect of the survey and is not competent to testify concerning it.^{*/}

Even if he were competent to testify about the survey, at the very least the NAB would be required to provide the entire survey (not simply that part from which Mr. Abel selectively quotes) as well as the relevant underlying documentation requested by the Joint Sports Claimants. The Tribunal's April 3, 1985 prehearing order, which incorporates an agreement among all the parties including the NAB, specifically provides that:

"(1) Parties shall, upon request, furnish to an opposing party non-privileged underlying documents related to the direct exhibits and testimony. The nature and extent to which underlying documentation is to be furnished shall be reasonable under the circumstances." 50 Fed. Reg. at 13846.

The NAB's refusal to provide the documentation sought by the Joint Sports Claimants is flatly contrary to the parties'

^{*/} A substantial amount of survey evidence will be presented to the Tribunal in this proceeding. The Joint Sports Claimants believe that in all other cases save this one the parties have provided a witness who was responsible for the design and/or execution of the survey.

agreement and the Tribunal's order and will prevent meaningful cross-examination of Mr. Abel concerning the NCTA survey.*/

Furthermore, the Tribunal's rules specifically require the parties to include certain basic information along with any study which is offered in evidence. See 37 C.F.R. §§ 301.51(h) & (i). According to these rules, the evidence actually offered must state, among other things,

- the study plan;
- all relevant assumptions;
- the techniques of data collection;
- the techniques of estimation and testing;
- the facts and judgments upon which conclusions are based;
- a clear description of the survey design;
- the definition of the universe under consideration;
- the sampling frame and units;
- the validity and confidence limits or major estimates; and
- an explanation of the method of selecting the sample and of which characteristics were measured or counted.

*/ It may very well be that the NAB has not subscribed to the study and thus is not in a position to provide it. However, this simply highlights the unreliability of Mr. Abel's reference to the study, and the impropriety of admitting it into evidence. At a minimum, expert testimony concerning a study should be based upon a reading of the entire study, and not selected portions described in trade journal articles.

The NAB not only has failed to include any of this information required by the Tribunal in its direct case -- it has also refused to provide the information altogether with regard to the NCTA survey. Accordingly, Mr. Abel's references to this survey must be stricken.

C. Reference to ELRA 1984/1985 CableMark Probe Survey (Abel p. 36).

On page 36 of his written testimony, Mr. Abel refers to selected results from a CableMark Probe survey conducted for the NAB in 1984 and 1985. The survey was undertaken by the consulting firm which Mr. Abel had founded prior to joining the NAB, The ELRA Group. The Joint Sports Claimants object to the reference to the ELRA 1984/1985 CableMark Probe Survey on the ground that the NAB has refused to provide the entire survey along with the underlying questionnaires and complete description of methodology.^{*/}

The NAB has agreed to provide only what it describes as the "cable radio portions" of the 1984/1985 CableMark Probe survey -- apparently on the ground that Mr. Abel has referred in his testimony only to that portion of the survey

*/ It is not clear from Mr. Abel's testimony whether he is competent to testify concerning this survey. Because his testimony indicates that the survey was conducted, at least in part, for the NAB, and that Mr. Abel has been directly involved with ELRA, no challenge to Mr. Abel's competency to testify concerning the survey is raised at this point. The Joint Sports Claimants, however, reserve their right to interpose such an objection at the evidentiary hearings if voir dire discloses that Mr. Abel is not competent to testify with regard to the survey.

dealing with cable carriage of radio stations. The Joint Sports Claimants believe, however, that they are entitled to review the entire survey, and not simply those portions which the NAB believes are relevant. To be sure, Mr. Abel has chosen to limit his testimony to that portion of the survey which relates to cable carriage of radio stations. Meaningful cross-examination of Mr. Abel on this point, however, requires the parties to have access to the entire survey so that the findings on radio carriage can be placed in the proper context. If the NAB is not willing or able to make the entire survey available to permit such cross-examination, it should not be allowed to place in the record only those portions which it feels supports its case.

The NAB's refusal to provide the underlying documentation concerning the ELRA 1984/1985 study is also objectionable for the same reasons discussed above concerning the NCTA 1984 study, i.e., violation of (1) the parties agreement as adopted in the Tribunal's April 3 notice; and (2) Sections 301.51(h) & (i) of the Tribunal's rules.

II. Objections To PBS' Direct Case

The Joint Sports Claimants object to PTV Exhibit 30 and all associated testimony. This exhibit consists of a study by McHugh and Hoffman, Inc. for PBS entitled "Carriage

of Public Television by Cable Systems: A Survey of Cable System Operators." The Joint Sports Claimants object to this study on the grounds that (1) PBS has failed to make a threshold showing of the reliability of the survey; and (2) PBS has refused to provide all the underlying documentation necessary to determine the reliability of the survey results -- specifically a list of those respondent cable systems which McHugh and Hoffman claim carried distant PBS stations.

A. Unreliability of McHugh and Hoffman Survey.

As the United States Court of Appeals for the Seventh Circuit noted in Baumholser v. Amax Coal Co., 630 F.2d 550 (1980):

"To qualify as a study or opinion poll for admission into evidence, there must be a substantial showing of reliability. There must be some showing that the poll is conducted in accordance with generally accepted survey principles and that the results are used in a statistically correct manner." 630 F.2d at 552 (emphasis added). See also J. Weinstein and M. Berger, Weinstein's Evidence ¶ 901(b)(9)[03] (1983).

The McHugh and Hoffman study fails to make the requisite showing of reliability.

In its study McHugh and Hoffman asked an allegedly random sample of cable operators how they valued "distant" PTV stations in comparison to distant commercial stations.

McHugh and Hoffman project the survey results to conclude that all Form 3 cable operators would accord PTV stations about 13% of total distant signal value and commercial stations about 87%. This value for PTV stations is some 4-5 times higher than that found in two separate but comparable surveys of cable operators -- one conducted for the Joint Sports Claimants by Browne, Bortz and Coddington, Inc. ("BBC") and the other for the NAB by The ELRA Group. The ELRA survey found that distant PBS stations had a value of only about 2.51% to cable operators, while the BBC survey showed a value for PBS of only 3.1%.

Based upon advice of their consultants and independent research, the Joint Sports Claimants believe that this discrepancy between the PBS survey, on the one hand, and the NAB and Joint Sports surveys on the other, is attributable directly to McHugh and Hoffman's faulty surveying techniques. In particular, McHugh and Hoffman has significantly overstated the number of respondent cable systems which carry distant PBS stations and thus has overstated the comparative value of PBS programming.

The PBS valuation number in the McHugh and Hoffman survey is directly related to the number of cable systems in the sample which actually carry distant PBS stations -- the higher the number of such systems, the higher the overall

valuation of PBS programming. See PTV Ex. 20 at 3-4 (testimony of Dale Rhodes). Data provided by Cable Data Corporation discloses that only about one of every four Form 3 cable systems (about 24.4%) in the United States carries a distant PBS station. Consistent with this fact, 24.3% of the BBC respondent cable operators and 20.8% of the ELRA respondent cable operators carried one or more distant PBS signals.^{*/} In contrast, some 45% of the McHugh and Hoffman respondents are claimed to have carried one or more distant PBS stations.^{**/}

McHugh and Hoffman's obvious overrepresentation of cable systems with distant PBS stations is attributable to the manner in which they classified systems as carrying or not carrying distant PBS stations. BBC and ELRA made this determination by referring directly to the cable operator's statements of account as filed with the Copyright Office -- only if a distant PBS station was listed on the statement of account did BBC and ELRA classify it as a system carrying a distant PBS station. McHugh and Hoffman, on the other hand, did not check the statements of account but simply asked each respondent if its system carried a PBS station which "originated outside [the system's] home market." An affirmative response resulted

^{*/} See Sports Ex. 2 at 5-6; NAB Ex. 9 at 14.

^{**/} See PTV Ex. 30 at 4.

in the system's being classified as one with a distant PBS station -- even though under the FCC rules, a PBS station originating outside a system's "home market" might nevertheless be considered a local must carry signal (e.g., the Baltimore PBS station in Washington, D.C.).

The misclassification of the McHugh and Hoffman respondent cable operators is apparent from the verbatim response they gave to Question 16: "What other reasons are there for your cable system carrying one or more distant Public Television stations." Many of the respondents answered that the only reason was that they were required to carry the PTV signals. See PTV Ex. 30 at 17-23. Obviously, distant PTV stations are not required to be carried by the FCC's rules.

B. Refusal to Produce Underlying Documentation.

At the very least, the foregoing facts make a prima facie case that the McHugh and Hoffman survey does not meet the threshold test of reliability necessary for admissibility. These facts were presented to counsel for PBS, who refused to take any action to "clean up" the survey data by ensuring that only those cable systems which in fact carried distant PBS stations are counted in the valuation of distant PBS stations.

Counsel for PBS also refused to provide the Joint Sports Claimants with the underlying documentation necessary

to determine whether each of the respondent systems actually carried distant PBS stations -- namely, a list of those systems which could be used to check individual statements of account. The refusal to provide such a list effectively prevents the Joint Sports Claimants and other parties from determining the extent to which the McHugh and Hoffman survey has confused distant and local carriage of PBS stations and thus over-valued PBS programming. Such refusal is also plainly inconsistent with the parties agreement and Tribunal directive to provide underlying documentation.


The only excuse ever offered for denying access to the list of systems is that such would constitute a breach of confidentiality accorded the survey respondents. The Joint Sports Claimants, who also have presented the Tribunal with a survey of cable operators, obviously have no desire to breach such confidentiality. Accordingly, the Joint Sports Claimants agreed to request only a list of the systems without identifying any of the specific answers offered by any of the McHugh and Hoffman respondents. The Joint Sports Claimants also agreed that no effort would be made to contact these respondents or in any other way to discern the responses of particular individuals and systems.^{*/}

^{*/} The Joint Sports Claimants also agreed to provide any party with the same information it was requesting from PBS.

The Joint Sports Claimants were advised by their consultants at BBC that, under such circumstances, the providing of a list of respondent cable systems would not constitute a breach of confidentiality or industry ethics. BBC also so advised McHugh and Hoffman. Nevertheless, PBS has refused to provide the Joint Sports Claimants with the requested information -- information which is necessary to establish the extent to which the McHugh and Hoffman survey overvalues PBS stations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Helen Jean Bushnell, a secretary in the law firm of Arnold & Porter, hereby certify that I have this 29th day of May, 1985, caused copies of the "Joint Sports Claimants' Objections to Direct Cases" to be mailed by first class mail, postage prepaid, to the following parties:

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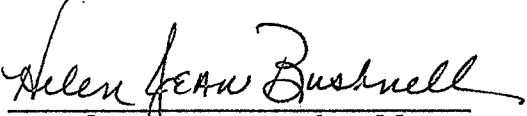
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